No. 96-1470

(15)

Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

QUALITY KING DISTRIBUTORS, INC.,

Petitioner,

v.

L'ANZA RESEARCH INTERNATIONAL, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF RESPONDENT

ROGER S. SMITH, PRESIDENT
Counsel of Record
AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202
(703) 415-0780

ARTHUR J. LEVINE
KEITH M. KUPFERSCHMID
CAROL R. WILLIAMS
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.
1300 I Street, NW
Washington, D.C. 20005
(202) 408-4000

JOHN N. O'SHEA
WARNER LAMBERT
201 Tabor Road
Morris Plains, NJ 07950

Counsel for Amicus Curiae

September 22, 1997

37 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE PLAIN LANGUAGE OF THE COPYRIGHT ACT DEMONSTRATES THAT SECTION 602(a) PROHIBITS THE UNAUTHORIZED IMPORTATION OF LAWFULLY MADE COPIES 4

II. SECTION 602 GRANTS TO COPYRIGHT OWNERS AN IMPORTANT RIGHT THAT IS A SEPARATE AND DISTINCT RIGHT FROM THE DISTRIBUTION RIGHT IN SECTION 106(3) 7

A. Section 106(3) Is a Domestic Distribution Right that Has No Effect on Acts Outside the United States 7

B. The Plain Language of Section 501 Further Establishes that the Importation Right in Section 602(a) Is a Separate and Distinct Right from the Section 106(3) Domestic Distribution Right 8

III. SECTION 109(d) SUGGESTS THAT SECTION 109(a) APPLIES ONLY WHEN THE COPIES AND PHONORECORDS ARE MADE AND ACQUIRED IN THE UNITED STATES 10

IV. QUALITY KING'S INTERPRETATION OF SECTION 109(a) IS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 602(a) AND THE LEGISLATIVE HISTORY OF SECTION 602(a) BECAUSE IT WOULD RENDER SECTION 602(a) VIRTUALLY MEANINGLESS 13

A. Quality King's Construction of Section 109(a) Would Render the Plain Language of Section 602(a) Virtually Meaningless 13

B. Quality King's Interpretation of Section 109(a) Is Contrary to the Legislative History, Which Demonstrates that Congress Intended Section 602(a) to Provide Copyright Owners with the Right to Prevent Parallel Importation of Their Works 17

V. QUALITY KING'S INTERPRETATION OF SECTION 109(a) WOULD RENDER THE EXCEPTIONS IN SECTIONS 602(a) AND (b) SUPERFLUOUS 21

VI. THE STANDARDS USED BY THE COURTS TO DETERMINE LIABILITY FOR PARALLEL IMPORTATION IN TRADEMARK INFRINGEMENT CASES SHOULD NOT BE CONSIDERED OR APPLIED TO DETERMINE LIABILITY FOR PARALLEL IMPORTATION UNDER THE COPYRIGHT LAW 23

VII. QUALITY KING'S CLAIMS OF UNFAIRNESS ARE MORE APPROPRIATELY ADDRESSED, IF AT ALL, BY THE ANTITRUST LAWS OR THE DOCTRINE OF CONTRIBUTORY INFRINGEMENT THAN BY PROVISIONS IN THE COPYRIGHT ACT 25

CONCLUSION 28

TABLE OF AUTHORITIES

CONSTITUTIONS

U.S. Const. art. I, § 8, cl. 8 23

FEDERAL STATUTES

17 U.S.C. § 106 (1997) 4

17 U.S.C. § 109 (1997) 2,4,5,10 13,16

17 U.S.C. § 501 (1997) 4

17 U.S.C. § 602 (1997) 2,6,8,13 15,16,17,20 21,22

Lanham Act (15 U.S.C. §§ 1051-1127 (1997)) 24

FEDERAL CASES

Blickstein v. Donaldson Lithography Co.,
188 U.S. 239 (1903) 25

BMG Music v. Perez,
952 F.2d 318 (9th Cir. 1991) *cert. denied*,
505 U.S. 1206 (1992) 5, 12

Columbia v. Redd Horne,
749 F.2d 154 (3d Cir. 1984) 5

Columbia Broadcasting Sys., Inc. v. Scorpio Music Distrib., Inc.,
569 F. Supp. 47 (E.D. Pa. 1983) 5,7,11,12 13,27

Connecticut Nat'l Bank v. Germain,
503 U.S. 249 (1992) 21

Cosmair Inc. v. Dynamite Enter. Inc.,
226 U.S.P.Q. 344 (S.D. Fla. 1985) 12

Crawford Fitting Co. v. J. T. Gibbons, Inc.,
482 U.S. 437 (1987) 16

Ferrero U.S.A, Inc.. v. Ozak Trading, Inc.,
753 F. Supp. 1240 (D.N.J.), *aff'd*,
935 F.2d 1281 (3d Cir. 1991) 24

Filmvideo Releasing Corp. v. Hastings,
668 F.2d 91 (2d Cir. 1981) 11

Fonovisa, Inc. v. Cherry Auction Inc.,
76 F.2d 259 (9th Cir. 1996) 26

Fox Films Corp. v. Dayal,
286 U.S. 123 (1932) 23

Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.,
443 F.2d 1159 (2d Cir. 1971) 26

Mazer v. Stein,
347 U.S. 201 (1959) 23

McLoughlin v. Raphael Tuck Co.,
191 U.S. 267 (1903); 11

NEC Elec. v. CAL Circuit Abco,
810 F.2d 1506 (9th Cir.), *cert. denied,*
484 U.S. 851 (1987) 24

Parfums Givenchy v. Drug Emporium,
38 F.3d 477 (9th Cir. 1994), *cert. denied,*
514 U.S. 1004 (1995) 12

Radzanover v. Touche Ross & Co.
426 U.S. 148 (1976) 16

Red Baron-Franklin Park, Inc. v. Taito Corp.,
883 F.2d 275 (4th Cir. 1989) 5

Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.,
907 F. Supp. 1361 (N.D. Cal. 1995) 27

Sebastian Int'l Inc. v. Consumer Contracts Ltd.,
847 F.2d 1093 (3d Cir. 1988) 12

Societe Des Produits Nestle, S.A. v. Casa Hevetia Inc.,
982 F.2d 633 (1st Cir. 1992) 24

Sony Corp. v. Universal City Studios, Inc.,
464 U.S. 417 (1984) 23,25

United States v. Bass,
404 U.S. 336 (1971) 16

Universal City Studios v. Sony Corp.,
659 F.2d 963 (9th Cir. 1981),
rev'd on other grounds,
464 U.S. 417 (1984) 27

Vimar Seguros Y Reaseguros v. M/V Sky Reefer,
515 U.S. 528 (1995) 16

Watt v. Alaska,
451 U.S. 259 (1981) 16

MISCELLANEOUS

Copyright Law Revision Part 1: Hearings Before the Subcomm. No. 3 of the House Comm. On the Judiciary,
89th Cong. 1st Sess. (1965) 22

Federal Trade Comm'm, U.S. Dep't of Justice,
Antitrust Guidelines for the Licensing of Intellectual Property reprinted in
68 Antitrust & Trade Reg. Rep. (BNA)
No. 1708 (Apr. 13, 1995) 26

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) . 11,19,20

4 Melville B. & David Nimmer,
Nimmer on Copyright (1997) 11

2 William F. Patry, *Copyright Law and Practice* (1994) . 14

S. Rep. No. 473, 94th Cong., 1st Sess. (1975) 19,20

S. Rep. No. 1333, 19th Cong., 2d Sess. (1946) 24

Secondary Supplementary Report of the Register of Copyrights on the General Revisions of the U.S. Copyright Law: 1975 Revision Bill,
94th Cong., 1st Sess. (1975) 19

Staff of House Comm. on the Judiciary,
87th Cong., 1st Sess., *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* (Comm. Print 1961) 14, 17

Staff of House Comm. on the Judiciary, 88th Cong., 1st Sess., *Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* (Comm. Print 1963) 14

Staff of House Comm. on the Judiciary,
88th Cong., 2d Sess., *Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft* (Comm. Print 1964) 18

Staff of House Comm. on the Judiciary,
88th Cong., 2d Sess., *Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law* (Comm. Print. 1964) 5,18

Staff of House Comm. on the Judiciary,
89th Cong., 1st Sess., *Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill* (Comm. Print 1965) 19

INTEREST OF THE *AMICUS CURIAE*

The American Intellectual Property Law Association ("AIPLA") is a national association of more than 10,000 members whose interests lie in the area of patent, copyright, trademark, trade secret, and other areas of intellectual property law. The AIPLA's members include attorneys in private practice and attorneys employed by corporations, universities, and government, and represent both owners and users of intellectual property. Unlike many other areas of practice in which separate and distinct plaintiff's and defendant's bars exist, most, if not all, intellectual property attorneys represent both intellectual property owners and alleged infringers.

The AIPLA has no stake in either the parties to this litigation or the result of this case, other than its interest in seeing correct and consistent interpretation of the law affecting intellectual property[1]. The AIPLA is deeply concerned about the possibility of broadening the interpretation of the first sale doctrine in a manner that would exhaust the parallel importation rights granted to copyright owners under section 602(a) of the Copyright Act. The interests of those in the business community would be directly and adversely affected if importers and other distributors were now found to be immunized from copyright liability under the first sale doctrine for their parallel importation of copyrighted works in violation of section 602(a) of the Copyright Act. Therefore, for the reasons set forth in this brief, the AIPLA respectfully requests that this Court uphold the prior judgment in favor of L'anza.

---

[1] Pursuant to Rule 37.6, none of the parties or their counsel have contributed either substantively or monetarily to the preparation of this brief. Specifically, only the amicus, its members and its counsel have made a monetary contribution to the preparation or submission of this brief.

BEST AVAILABLE COPY

SUMMARY OF THE ARGUMENT

The Ninth Circuit correctly held that the first sale privilege in section 109(a) of the Copyright Act does not immunize from liability those who violate section 602(a) by importing lawfully made copies into the United States without the authority of the copyright owner. Section 602(a) of the Copyright Act grants copyright owners the right to prevent the unauthorized importation of lawfully made copies and phonorecords of their works into the United States and is a distinct and separate right from the distribution right in section 106(3) of the Copyright Act.

Section 106(3) is a domestic distribution right that does not apply to acts occurring outside the United States. The plain language of section 602(a) makes clear that, unlike the distribution right in section 106(3), the importation right in section 602(a) applies to acts that occur outside the United States (provided the acts result in an importation into the United States). Section 501(a) also establishes that section 106(3) and section 602(a) are distinct rights because it explicitly makes the violation of either section separately actionable.

Section 109(a) should apply only when a copyrighted work is made *and acquired* in the United States. To apply section 109(a) properly, it must be read in light of the requirement in section 109(d) that qualifies the scope of section 109(a) so as to apply only to those who acquire ownership of the copies or phonorecords in the United States. This interpretation ensures the continued vitality of the purpose and effect of the first sale doctrine, as codified in section 109(a), while simultaneously ensuring the continued grant of a right to prevent parallel importation to copyright owners under section 602(a).

The alternative interpretation of section 109(a) supported by Quality King, mandating that section 109(a) apply whenever a copyrighted work is made in the United States, irrespective of where the copyrighted work is sold, would exhaust the parallel importation right in section 602(a) whenever a copyrighted work is made in the United States and sold outside the United States. This interpretation would render section 602(a) virtually meaningless and would make the exceptions in sections 602(a)(2) and (3) and section 602(b) superfluous. This Court has held that statutes should be read in a manner that gives effect and harmonizes discordant provisions and that does not result in superfluous provisions within a statute. Only L'anza's interpretation gives effect to sections 109(a) and 602(a) and does not result in superfluous provisions in the Copyright Act.

Quality King also cites to several trademark cases that it contends establish a precedent that prevents L'anza from prevailing. The analysis and holdings established by these cases are antithetical to over 200 years of copyright law. This Court has long recognized the differences between copyright law and trademark law and has consistently refused to import trademark law standards into the copyright law. Thus, in keeping with the precedents established by this Court, the trademark cases cited by Quality King should have no bearing on the outcome of this case.

Finally, Quality King's claims that holding for L'anza would permit L'anza to engage in an anticompetitive practice or would allow businesses to circumvent the trademark laws related to parallel importation by asserting copyright claims to prevent parallel importation are not relevant to a determination of the relationship between sections 109(a) and 602(a). When a copyright owner, or any other intellectual property owner, is

accused of anticompetitive activity, such an accusation is properly addressed by the antitrust laws, not by altering the Copyright Act.

ARGUMENT

I.
THE PLAIN LANGUAGE OF THE COPYRIGHT ACT DEMONSTRATES THAT SECTION 602(a) PROHIBITS THE UNAUTHORIZED IMPORTATION OF LAWFULLY MADE COPIES

The Copyright Act grants copyright owners certain exclusive rights that, together, comprise the bundle of rights known as copyright. Among the rights granted to copyright owners under the Copyright Act is the distribution right. Section 106 of the Copyright Act provides:

> Subject to sections 107 through 120, the owner of the copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> . . .
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . .

There are several exceptions to the exclusive rights in section 106, which are codified in sections 107-121 of the Copyright Act. One of these exceptions is the so-called "first sale doctrine" of section 109(a). Section 109(a) provides:

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

17 U.S.C. § 109(a) (1997). The first sale doctrine allows a person who lawfully owns a particular copy or phonorecord to dispose of possession of that copy or phonorecord even though the copyright owner would otherwise be able to prevent such a disposition by enforcing his section 106(3) distribution rights.

The first sale doctrine is not an absolute privilege to distribute copies and phonorecords. It is limited in several ways. For example, the phrase "made under this title" requires that the first sale privilege attaches only to copies and phonorecords that are "made in the United States." *BMG Music v. Perez*, 952 F.2d 318, 319 (9th Cir. 1991), *cert. denied*, 505 U.S. 1206 (1992); *Columbia Broadcasting Sys., Inc. v. Scorpio Music Distrib., Inc.*, 569 F. Supp. 47, 49 (E.D. Pa. 1983). *Compare* Staff of House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law* 207 (Comm. Print. 1964) (commenting on similar language in section 602(b)) (The phrase "'if this title had been applicable' is intended to effect a geographic restriction in the Copyright Act."). Another limitation on the first sale privilege is that it applies only to the distribution right. *See Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 281 (4th Cir. 1989) (stating that "courts and commentators likewise agree that the first sale doctrine has no application to the rights of the owner of a copyright guaranteed by § 106, except the right of distribution."); *Columbia v. Redd Horne*, 749 F.2d 154 (3d Cir. 1984). Section 109(a) does not immunize from copyright infringement liability anyone who

infringes any of the other rights afforded to copyright owners in the Copyright Act.

In addition to the rights under section 106, the Copyright Act, in section 602, also affords copyright owners the right to control the importation of their works into the United States. Section 602(a) provides that:

> Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501 . . . .

17 U.S.C. § 602(a) (1997). The language of section 602(a) refers only to the act of importing copies and phonorecords of the copyrighted work and not to the act of making copies or phonorecords of the copyrighted work. Therefore, section 602(a) provides copyright owners not only with the right to prevent the importation into the United States of copies and phonorecords that were unlawfully made (commonly referred to as "piratical works") but also those that were lawfully made but unlawfully imported (commonly referred to as "parallel imports" or "grey market goods").

Despite the plain language of 602(a), the express limitations on section 602 enacted by Congress in sections 602(a)(1), (2), and (3) and in 602(b), and the legislative history of those sections, Quality King argues that the first sale privilege in section 109(a) should limit the applicability of section 602(a). To make its argument, Quality King relies on language in section 602(a) that refers to section 106. As explained more fully in the following sections of this brief, the

construction of section 602(a) suggested by Quality King is contrary to the plain language of section 602(a). It is also contrary to the overall structure of the Copyright Act, rules of statutory construction, and the plain language of other provisions of the Copyright Act.

II.
SECTION 602 GRANTS TO COPYRIGHT OWNERS AN IMPORTATION RIGHT THAT IS A SEPARATE AND DISTINCT RIGHT FROM THE DISTRIBUTION RIGHT IN SECTION 106(3)

Congress's decision not to include section 602 in section 106(3) and to refer to section 602 separately in section 501 is compelling evidence that the importation right in section 602 is a right that is separate and distinct from the distribution right of section 106(3). Therefore, as section 109(a) applies only to section 106(3) and not to section 602, section 109(a) does not affect a copyright owner's ability to prevent the importation of copies of his work under section 602.

A. Section 106(3) Is a Domestic Distribution Right that Has No Effect on Acts Outside the United States

The rights granted to copyright owners have no extraterritorial effect, unless stated otherwise in the Copyright Act. *Scorpio*, 569 F. Supp. at 49 ("The protection afforded by the United States Code does not extend beyond the borders of this country unless the Code expressly states."). Because there is no express statement that the rights in section 106 have extraterritorial effect, section 106(3) (as well as the other rights in section 106) does not apply to acts that take place outside the United States. Section 602, however, does apply expressly to

acts that take place outside the United States (if those acts result in an importation into the United States). For example, section 602(b) prohibits importation of piratical copies and phonorecords when "the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable" (*i.e.*, importation prohibited when the unauthorized making of the copies of phonorecords occurs outside the United States). 17 U.S.C. § 602(b) (1997). Similarly, section 602(a) prohibits importation of copies and phonorecords "that have been acquired outside the United States." 17 U.S.C. § 602(a) (1997). In both cases, acts occurring outside the United States may form the basis of an infringement if they result in an importation into the United States. Accordingly, the rights granted in section 602 are distinct from the rights granted in section 106 because the 106 rights are enforceable only against domestic acts while the section 602 rights are enforceable against extraterritorial acts that result in an importation into the United States.

B. The Plain Language of Section 501 Further Establishes that the Importation Right in Section 602(a) Is a Separate and Distinct Right from the Section 106(3) Domestic Distribution Right

Section 501 further distinguishes between the distribution right in section 106(3) and the importation right in section 602(a). Section 501(a) explicitly provides copyright owners with a cause of action for violations of either section 106 *or* section 602. Specifically, section 501(a) provides:

> Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or the right of the author, as the case may be.

If Congress did not intend for section 602 to be distinct from the distribution right in section 106 there would be no need for the statute to reference section 602 separately. Congress's intent is further supported by the fact that section 602(a) itself specifies that importations that violate section 602 are actionable under section 501.

If Congress intended section 602 to be encompassed by section 106(3), then Congress could have either not referred to section 602 in section 501 or could have formulated section 501 to read "Anyone who violates any of the exclusive rights of the copyright owners as provided by sections 106 through 118, *including importations in violation of section 602* . . . is an infringer . . . ." Since Congress used the term "or" to separate the two rights and not the term "including," the logical conclusion is that Congress intended the section 602 importation right to be distinct from the distribution right in section 106(3) and separately actionable under section 501. As section 602 is a separate and distinct right from section 106(3) and section 109(a) only exhausts the distribution right in section 106(3), this Court should hold that section 109(a) does not exhaust the importation right in section 602(a).

III.
SECTION 109(d) SUGGESTS THAT SECTION 109(a) APPLIES ONLY WHEN THE COPIES AND PHONORECORDS ARE MADE AND ACQUIRED IN THE UNITED STATES

To determine the appropriate scope of applicability of section 109(a) and, in particular the relationship between sections 109(a) and 602(a), section 109(a) should be read in light of the qualifications placed on it by section 109(d). Section 109(d) suggests that the first sale privilege in section 109(a) should attach only to those copyrighted works that are made *and acquired* in the United States.

Section 109(a) allows a person who owns a lawfully made copy or phonorecord embodying a copyrighted work to dispose of ownership of that particular copy or phonorecord in any manner without violating the copyright owner's distribution right in section 106(3). In addition to the section 109(a) requirement that the copies or phonorecords be lawfully made in the United States, section 109(d) imposes a further qualification on the availability of the first sale privilege. Section 109(d) provides that the privileges granted by section 109(a) do not extend to any person unless that person *acquires ownership* of the copy or phonorecord.[2] 17 U.S.C. § 109(d) (emphasis added).

---

[2] Section 109(d) also provides that the section 109(a) privileges apply when authorized by the copyright owner. As the copyright owner did not authorize the distribution in this case, however, this phase has no effect on the outcome of this case. Section 109(d) provides: "The privileges prescribed by subsections (a) and (c) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it." 17 U.S.C. § 109(d) (1997).

The acquisition of ownership requirement in section 109(d) is satisfied whenever a person acquires ownership of a copy or phonorecord embodying a copyrighted work by means of a sale or other transfer of ownership. Accordingly, any person qualifying for the first sale privilege in section 109(a) must first *acquire* the copy or phonorecord by virtue of a sale or other transfer of ownership. As the Copyright Act has no extraterritorial effect, and therefore does not apply to acts outside U.S. territories, AIPLA respectfully submits that such acquisition must occur in the United States.[3]

There is support for this position in the legislative history. In discussing the burden of proof under section 109, the House Report states that a "court decision holding that plaintiff . . . had the burden of establishing that the allegedly infringing copies in the defendant's possession were not lawfully made *or acquired under section 27 of the present law*" (the Copyright Act of 1909) was improper because the "burden of proving whether a particular copy was lawfully made *or acquired* should rest on the defendant." *Id.* (emphases added). *See also* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 80 (1976) ("[Section 109(d)] qualifies the privileges specified in subsections (a) and (b) by making clear that they do not apply

---

[3] *See McLoughlin v. Raphael Tuck Co.*, 191 U.S. 267 (1903); *Filmvideo Releasing Corp. v. Hastings*, 668 F.2d 91 (2d Cir. 1981); *Scorpio*, 569 F. Supp. at 49. *See also* 4 Melville B. & David Nimmer, *Nimmer on Copyright* § 17.02 (1997) ("[A]cts of infringement which occur outside the jurisdiction of the United States are not actionable under the United States Copyright Act . . . [unless] part of the 'act' of infringement occurs within the United States."). *Compare* section 602(a), which requires that the copies and phonorecords be "acquired outside the United States" *with* section 109(d), which refers only to "acquiring ownership." If section 109(d) were to have extraterritorial effect as section 602(a), Congress could have explicitly permitted acquisitions outside the United States to qualify under the section 109(d) acquisition of ownership requirement.

to someone who merely possesses a copy without having acquired ownership of it."). These statements suggest that Congress intended for section 109(a) to apply only when the particular copies were made and acquired under this title.

Several of the cases that address the relationship between sections 109(a) and 602(a) have held that section 109(a) applies only when the imported works are made and acquired in the United States. In *Scorpio*, for example, the court held that the importer infringed the copyright owner's parallel importation rights under section 602(a) because "section [109(a)] grants first sale protection to the third party buyer of copies which have been legally manufactured and sold within the United States and not to purchasers of imports [that are sold outside the United States]." 569 F. Supp. at 49. Others courts have likewise held that section 109(a) applies only when the imported works are made and sold in the United States. *See, e.g., Parfums Givenchy v. Drug Emporium*, 38 F.3d 477 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995); *BMG Music*, 952 F.2d at 319; *Cosmair Inc. v. Dynamite Enter. Inc.*, 226 U.S.P.Q. 344 (S.D. Fla. 1985). In fact, the only court to hold otherwise failed to consider the domestic acquisition of ownership requirement imposed by section 109(d). *See Sebastian Int'l Inc. v. Consumer Contracts Ltd.*, 847 F.2d 1093 (3d Cir. 1988). In light of these cases and the acquisition of ownership requirement in section 109(d), the scope of section 109(a) should be interpreted as applying to works that are lawfully made and acquired in the United States.

IV.
QUALITY KING'S INTERPRETATION OF SECTION 109(a) IS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 602(a) AND THE LEGISLATIVE HISTORY OF SECTION 602(a) BECAUSE IT WOULD RENDER SECTION 602(a) VIRTUALLY MEANINGLESS

Quality King's interpretation of section 109(a) is contrary to the plain language of section 602(a) because, under such an interpretation, section 109(a) would bar copyright owners from enforcing their parallel importation rights under section 602(a) in virtually every instance. Section 602(a) thereby would be rendered virtually meaningless. Quality King's interpretation is also contrary to the legislative history, which demonstrates that Congress intended to grant copyright owners the right to prevent parallel importation.

A. Quality King's Construction of Section 109(a) Would Render the Plain Language of Section 602(a) Virtually Meaningless

Under Quality King's interpretation of section 109(a), the first sale privilege would attach, not just to works sold in the United States, but also to works sold outside the United States. The court in *Scorpio* recognized the fallacy in such statutory construction when it stated that "[c]onstruing § 109(a) as superseding the prohibition on importation set forth in the more recently enacted § 602 would render § 602 meaningless." 569 F. Supp. at 49.

Not only would Quality King's interpretation of section 109(a) render section 602(a) virtually meaningless but it also would make it extremely easy for a party to destroy the importation right. The court in *Scorpio* recognized the dangers

that would result from applying section 109(a) too broadly when it stated that "[t]hird party purchasers who import phonorecords could circumvent the statute, in every instance, by simply buying the records indirectly." For example, an American copyright owner might choose to grant a foreign distributor the right to distribute copies of his work in certain foreign countries. Once the copyright owner sells the copies to the foreign distributor, the copyright owner would be stripped of his parallel importation right, as the foreign distributor or a third party who obtains the copies from the foreign distributor could import the copies into the United States by invoking the first sale privilege.[4]

---

[4] The only means, other than section 602(a), that copyright owners have to protect against parallel importation of their works is the enforcement of contractual limitations. The use of contractual limitations for controlling parallel importations into the United States, however, has proven not to be practicable. Contract actions have generally been found to be unduly expensive and ineffective. *See* Staff of House Comm. on the Judiciary, 88th Cong., 1st Sess., *Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 212-14, 232, 327 (Comm. Print 1963); 2 William F. Patry, *Copyright Law and Practice* 867 (1994). Moreover, many times enforcement of contractual terms is impossible to obtain because there is no privity between the importer and the copyright owner or because the contract must be enforced in the foreign country where the sale or unauthorized distribution took place. *See* Staff of House Comm. on the Judiciary, 87th Cong., 1st Sess., *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 126 (Comm. Print 1961); Patry, *supra*. Consequently, the only viable solution to prevent parallel importation is enforcement of a copyright owner's parallel importation rights under section 602(a). If section 109(a) is interpreted so broadly, so as to prevent an action under section 602(a), copyright owners will be left with no practical remedy for preventing parallel importation of their works.

Quality King claims that its interpretation of section 109(a) would not render section 602(a) meaningless because section 602(a) provides copyright owners with remedies against importers of piratical copies and against licensees and bailees that otherwise would not be available. (Pet.'s Br. at 24-29.) As to its arguments concerning piratical copies, these claims are incorrect. If section 602(a) ceased to exist, copyright owners would still be able to prevent the importation of piratical copies of their works under section 602(b). Section 602(b) provides that "[i]n a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited." 17 U.S.C. § 602(b) (1997). Hence, Quality King's claim that section 602(a) provides the copyright owner with remedies against piratical imports "*that otherwise would not be available*" is patently incorrect as such remedies are available under section 602(b). (Pet.'s Br. at 24.) (emphasis added).

Quality King's claim that section 602(a) would still be effective against licensees and bailees is likewise flawed. There is no hint anywhere in the language of the Copyright Act or the legislative history that Congress intended to limit the application of section 602(a) to licensees and bailees. By attempting to apply section 109(a) to section 602(a), Quality King is distorting the Copyright Act to fit its interpretation of section 109(a). Further, as licensees and bailees are not owners of the copies or phonorecords in their possession, and thus, under section 109(d) are never in a position to avail themselves of the first sale privilege, they are irrelevant to the Court's determination of the relationship between section 109(a) and 602(a).

L'anza's interpretation of the relationship between sections 109(a) and 602(a) gives effect to both provisions. This Court has held that it "must read the statutes to give effect to

each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 266 (1981). This Court has also held that "courts should interpret a statute with an eye toward the surrounding landscape and an ear for harmonizing potentially discordant provisions," *United States v. Bass*, 404 U.S. 336, 344 (1971), and "[w]hen two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed intention by Congress, to regard each as effective." *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). L'anza's interpretation of the relationship between sections 109(a) and 602(a) harmonizes both provisions by giving effect to both provisions. To the contrary, Quality King's interpretation of section 109(a) gives effect only to section 109(a) and reconciles it with section 602(a) only through extreme contortions.

Further, it is a well-established rule of statutory construction that a specific statute or provision is not controlled or nullified by a general one. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 444 (1987) (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976); *Morton v. Mancari*, 417 U.S. 535 (1974)). Section 109(a) is a general provision that applies whenever anyone who owns a copyrighted work desires to transfer that work. Section 602(a), however, applies only to a specific type of transfer -- an importation. Thus, to the extent that section 602(a) and section 109(a) appear to be inconsistent, section 602(a) prevails. Therefore, the Court should hold in favor of L'anza's interpretation.

B. Quality King's Interpretation of Section 109(a) Is Contrary to the Legislative History, Which Demonstrates that Congress Intended Section 602(a) to Provide Copyright Owners with the Right to Prevent Parallel Importation of Their Works

Quality King's interpretation is contrary to the legislative history. The scope of the importation right was the subject of numerous discussions and comments in the drafting process leading to enactment of the 1976 Copyright Act. In the Copyright Office's first report on the Copyright Act revisions, the Register suggested that copyright owners should not be granted a right to prevent parallel importation. This suggestion was based on the belief that extending copyright protection to parallel importation would require the United States Customs Service to enforce private contracts. Staff of House Comm. on the Judiciary, 87th Cong., 1st Sess., *Copyright Law Revision Part 1: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* 126 (Comm. Print 1961).

This Copyright Office suggestion was met with opposition from the copyright industry. After careful consideration of the comments of the copyright industries and while maintaining its wish to avoid entangling Customs in private contractual disputes, the Copyright Office produced a preliminary draft of a copyright bill that contained two alternative importation prohibition provisions. Both alternatives clearly provided for the right to prevent parallel importation.[5]

---

[5] The distinction between the alternatives related only to Custom's ability to seize imported works and to notify copyright owners of the importation of potentially infringing works. Alternative A did not require Customs to seize any imported works but provided for notification to the

In commenting on the Copyright Office's draft bill the General Counsel of the Copyright Office stated that the importation right covered both the importation of unauthorized copies and:

> the importation for distribution in the United States of foreign copies that *were made under proper authority* but that, if sold in the United States, would be sold in contravention of the rights of the copyright owner who holds the exclusive right to sell copies in the United States.

Staff of House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law* 203 (Comm. Print. 1964) (emphasis added). The Supplementary Report of the Register further evidenced the intent that the 1976 Copyright Act protect against parallel importation:

> In the second situation covered by section 602, the copies or phonorecords were lawfully made but their distribution in the United States would violate the exclusive rights

---

copyright owner of the importation. Alternative B allowed Customs to seize piratical copies but not "lawfully made" copies, and also provided for notification. Staff of House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft* 32-34 (Comm. Print 1964). *Accord* Staff of House Comm. on the Judiciary, 88th Cong., 2d Sess., *Copyright Law Revision Part 4: Further Discussions and Comments on Preliminary Draft for Revised U.S. Copyright Law* 203-04 (Comm. Print. 1964) (comments of Abe A. Goldman, General Counsel of the Copyright Office).

> of the U.S. copyright owner. . . . [I]t would not be practicable for the Bureau of Customs to enforce a prohibition . . . "where the copies or phonorecords were lawfully made." On the other hand, unauthorized importation in this situation for the purpose of public distribution in the United States would be an infringement and could be enjoined.

Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., *Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill* 149-50 (Comm. Print 1965).

Recognizing that the interested parties generally agreed on the scope of the parallel importation right and the limited role of Customs in enforcing this right, the Register of Copyrights recommended and Congress adopted existing section 602 of the Copyright Act. The Register of Copyrights and both houses of Congress explicitly noted that section 602 assigned copyright infringement liability in two distinct situations: importation of piratical copies and importation of "lawfully made copies" (*i.e.*, parallel importation). S. Rep. No. 473, 94th Cong., 1st Sess. 151 (1975); H.R. Rep. No. 1476 at 169; *Second Supplementary Report of the Register of Copyrights on the General Revisions of the U.S. Copyright Law: 1975 Revision Bill*, 94th Cong., 1st Sess. 397 (1975); Staff of House Comm. on the Judiciary, 89th Cong., 1st Sess., *Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill* 149 (Comm. Print 1965).

Commenting on the language in section 602, Congress observed:

The second situation covered by section 602 is that where the copies or phonorecords were lawfully made but their distribution in the United States would infringe the U.S. copyright owner's exclusive rights. As already said, the mere act of importation in this situation would constitute an act of infringement and could be enjoined. However, in cases of this sort it would be impracticable for the United States Customs Service to attempt to enforce the importation prohibition, and section 602(b) provides that, unless a violation of the manufacturing requirements is also involved, the Service has no authority to prevent importation, 'where the copies or phonorecords were lawfully made.'

S. Rep. No. 473 at 152; H.R. Rep. No. 1476 at 170. Under either situation, however, section 602(a) simply stated the general rule that unauthorized importation occurs any time the copies sought to be imported were "acquired outside the United States." S. Rep. No. 473 at 151-52; H.R. Rep. No. 1476 at 170.

The three exceptions to that general rule are contained within section 602(a). S. Rep. No. 473 at 151-52; H.R. Rep. No. 1476 at 170. They do not include the first sale doctrine, and none of them is applicable to the facts of the present case. *See* 17 U.S.C. 602(a)(1)-(3) (1997). When none of these exceptions apply, as in the instant case, the copyright owner may seek damages and an injunction. *See* S. Rep. 473 at 152; H.R. Rep. No. 1476 at 170. Accordingly, as the legislative history demonstrates, section 602(a) was intended to provide copyright owners with a right to prevent parallel importation, which is limited only by section 602(a)(1),(2), and (3) and the Customs limitations in section 602(b). Broadening the scope

of section 109(a), as Quality King argues, would be contrary to Congress's intent to provide copyright owners with a right to prevent parallel importation limited only by the express limitations in section 602.

V.
QUALITY KING'S INTERPRETATION OF SECTION 109(a) WOULD RENDER THE EXCEPTIONS IN SECTIONS 602(a) AND (b) SUPERFLUOUS

In addition to rendering section 602(a) meaningless, Quality King's interpretation of section 109(a) would also render the exceptions to the importation right in sections 602(a)(2) and (3) and section 602(b) superfluous. This Court has held that "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Because Quality King's interpretation of section 109(a) results in superfluous provisions in the Copyright Act and the Court disfavors such interpretations, Quality King's interpretation of section 109(a) should not be adopted by the Court.

Section 602(a) is limited by section 602(b), which provides that Customs has the authority to seize imported copies only "where the *making* of the copies . . . would have constituted an infringement of copyright if [Title 17] had been applicable." 17 U.S.C. § 602(b) (1997) (emphasis added). Customs does not have the authority to seize "lawfully made" copies (*i.e.*, parallel imports). "In either case," however, Customs may provide notification to the copyright owner of the importation of copies of his work. 17 U.S.C. § 602(b) (1997). There would be no need for separate Customs procedures for lawfully and unlawfully made copies if section 602(a) did not

cover both. Under Quality King's interpretation there would be no need to notify the copyright owner of the importation of lawfully made copies because importers would merely have to assert their first sale privileges under section 109(a) to defeat a claim of copyright infringement.

Further, section 602(a)(2) provides that the right of importation in section 602(a) does not apply to importation "for the private use of the importer and not for distribution, by any person with respect to more than one copy . . . at any one time" or by any person entering the United States when the copies form part of the person's personal baggage. 17 U.S.C. § 602(a)(2) (1997). Similarly, section 602(a)(3)[6] provides for an exception to section 602(a) when the importation is "by or for an organization for scholarly, educational, or religious purposes." 17 U.S.C. § 602(a)(3) (1997). Under Quality King's interpretation of section 109, these exceptions have no effect because an importer or other person would be able to import works into the United States in circumstances broader than those permitted by section 602(a)(2) and (3), thereby dispensing with the need for any person ever to employ a defense to liability under these sections. In summary, Quality King's interpretation of section 109(a) should not be adopted because it would result in sections 602(a)(2) and (a)(3), and section 602(b) being superfluous.

---

[6] This section's importance is demonstrated by the extensive discussion that accompanied its adoption. *See Copyright Law Revision Part 1: Hearings Before the Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1041-43, 1064-66, 1900-03 (1965).

VI.
THE STANDARDS USED BY THE COURTS TO DETERMINE LIABILITY FOR PARALLEL IMPORTATION IN TRADEMARK INFRINGEMENT CASES SHOULD NOT BE CONSIDERED OR APPLIED TO DETERMINE LIABILITY FOR PARALLEL IMPORTATION UNDER THE COPYRIGHT LAW

Although both trademark law and copyright law have been invoked by domestic manufactures to oppose parallel importation, their origin and purpose markedly differ from one another. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (noting "the fundamental differences between trademark law and copyright law"). It follows that decisions rendered under trademark law with respect to parallel importation are not applicable to copyright cases.

The purpose of copyright is: "To promote the progress of science and useful arts, by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. I, § 8, cl. 8. It has been observed frequently that the primary purpose of copyright is not to reward the author, but to secure "the general benefits derived by the public from the labor of authors." *Fox Films Corp. v. Dayal*, 286 U.S. 123, 127 (1932). It is apparent, however, that the ultimate goal of benefiting the public is achieved under the United States system exclusively by means of fully benefiting the author with the provision of a "special reward." *Sony*, 464 U.S. at 429. The nature of this "special reward" is unequivocally economic. "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."

Mazer v. Stein, 347 U.S. 201, 219 (1959). The ends of copyright law are best served by providing the copyright owner an optimized "special reward."

On the other hand, federal trademark law, as embodied in the Lanham Act (15 U.S.C. §§ 1051-1127 (1997)), is intended to protect two distinct interests.

> [T]he purpose underlying any trade-mark statute is twofold. One is to protect the public so that it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get. Secondly, where the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriations by pirates and cheats.

S. Rep. No. 1333, 19th Cong., 2d Sess. 3 (1946).

Trademark cases dealing with parallel importation generally have focused on whether material differences exist between the domestic version and the parallel import, either in the product itself or its packaging. *See, e.g., Ferrero U.S.A, Inc.. v. Ozak Trading, Inc.*, 753 F. Supp. 1240 (D.N.J.), *aff'd*, 935 F.2d 1281 (3d Cir. 1991); *Societe Des Produits Nestle, S.A. v. Casa Hevetia Inc.*, 982 F.2d 633 (1st Cir. 1992). If such differences exist, importation is considered to be infringement. *Ferrero*, 753 F. Supp. at 1246; *Societe Des Produits Nestle, S.A*, 982 F.2d at 653. If not, there is ordinarily no infringement and no basis in trademark law to exclude the parallel import. *NEC Elec. v. CAL Circuit Abco*, 810 F.2d 1506 (9th Cir.), *cert. denied*, 484 U.S. 851 (1987).

In concentrating solely on the consumer protection goal of the Lanham Act, thereby limiting the inquiry to the quality of the imported trademark goods compared to the domestic, the courts in these cases have largely looked past the interests of the trademark owner. In the context of copyright, however, *Bleistein v. Donaldson Lithography Co.* teaches that the aesthetic quality of the work is not an appropriate area of inquiry. 188 U.S. 239 (1903). Accordingly, the only interest that remains to be addressed is that of the copyright owner, which is best served by optimizing the "special reward" that copyright law bestows.

This Court has long recognized the difference between copyright law and trademark law and has consistently refused to import trademark law standards into the copyright law. *See Sony*, 464 U.S. at 439. In keeping with the precedents established by this Court, the trademark cases relating to parallel importation cited by Quality King should have no bearing on the outcome of this case.

VII.
QUALITY KING'S CLAIMS OF UNFAIRNESS ARE MORE APPROPRIATELY ADDRESSED, IF AT ALL, BY THE ANTITRUST LAWS OR THE DOCTRINE OF CONTRIBUTORY INFRINGEMENT THAN BY PROVISIONS IN THE COPYRIGHT ACT

To the extent that the Court might be reluctant to hold for L'anza in this case because of Quality King's claims that such a holding would be unfair (Pet.'s Br. at 11) or would allow businesses to circumvent the trademark laws related to parallel importation by asserting copyright claims to prevent parallel importation (Pet.'s Br. at 9), AIPLA respectfully submits that

such concerns should have no bearing on the decision in this case because there are other, more suitable means outside the Copyright Act for addressing such concerns. For example, the antitrust laws are tailored specifically to address the type of anticompetitive practices (*e.g.*, the "market allocation" (Pet.'s Br. at 33)) complained of by Quality King.[7]

Intellectual property should be treated under antitrust laws like all other forms of property. *See, e.g.*, Federal Trade Comm'm, U.S. Dep't of Justice, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.0, *reprinted in* 68 Antitrust & Trade Reg. Rep. (BNA) No. 1708, at S-3 (Apr. 13, 1995). Claims of anticompetitive practices related to parallel importation affect all areas of intellectual property, including patents, copyrights, and trademarks, and therefore, these claims are better addressed through the antitrust laws rather than tinkering with each of the individual intellectual property laws.

Another more suitable means in the copyright law for addressing such concerns would be under the doctrine of contributory infringement. A person may be liable as a contributory infringer only if that person knew of the infringing

---

[7] We do not intend to indicate in any way that we agree with Quality King's claim that holding for L'anza would unfairly impact Quality King or that we believe that L'anza encroached upon any antitrust provisions. Rather, we believe there are better vehicles for resolving any perceived unfairness a holding for L'anza might generate. Further, to the extent that the antitrust laws might be used to address perceived unfairness with respect to a copyright owner's exercise of his or her parallel importation rights under the Copyright Act, no antitrust violation should ever exist when the copyrighted work is the essential object of the importation. For instance, when the goods being imported are sound recordings, books, motion pictures, computer software, or any other work identified in section 102 of the Copyright Act, no antitrust violation would be warranted.

activity and materially contributed to the infringing activity. *See Gershwin Publ'g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). *See also Fonovisa, Inc. v. Cherry Auction Inc.*, 76 F.2d 259, 264 (9th Cir. 1996); *Universal City Studios v. Sony Corp.*, 659 F.2d 963, 975 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984); *Religious Tech. Ctr. v. Netcom On-Line Communication Serv., Inc.*, 907 F. Supp. 1361, 1373-75 (N.D. Cal. 1995). Consequently, when a person, other than the importer, distributes grey market goods in the United States, that person should not be held liable for direct infringement of section 602(a) because they have not imported the grey market goods. Rather, that person should be liable as a contributory infringer of section 602(a), provided the person knew that the imported goods were grey market goods and the person participated in the infringing act. As holding a person who knew their activity was infringing would not be unfair, it would not be unfair to hold a person liable as a contributory infringer for a violation of the right of parallel importation in section 602(a).[8]

---

[8] Quality King is not the importer, and, therefore, it could be liable only for contributory infringement of section 602(a), not direct infringement of section 602(a). The facts of this case were silent as to knowledge and participation. *See Scorpio*, 569 F. Supp. at 48, which also involved a third party who received the goods from an importer. The *Scorpio* court did not address the issue of whether the third party was a contributory infringer, stating that "the question of whether defendant was the importer need not be resolved, in view of the law regarding vicarious and contributory infringement and the undisputed fact that International Traders was an importer."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

AMERICAN INTELLECTUAL PROPERTY
LAW ASSOCIATION

Roger S. Smith, President
American Intellectual Property
Law Association
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202
(703) 415-0780

Arthur J. Levine
Keith M. Kupferschmid
Carol R. Williams
FINNEGAN, HENDERSON,
FARABOW, GARRETT &
DUNNER, L.L.P.
1300 I Street, N.W.
Washington, D.C. 20005
(202) 408-4000

John N. O'Shea
WARNER LAMBERT
201 Tabor Road
Morris Plains, New Jersey 07950
(201) 540-2343

Counsel for Amicus Curiae AIPLA